Supreme Court, U.S.
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No. 01-560

IN THE

Supreme Court of the United States

NEW YORK ASSOCIATION OF CONVENIENCE STORES, NATIONAL ASSOCIATION OF CONVENIENCE STORES, and M.W.S. ENTERPRISES, INC.,

Petitioners,

v.

ARTHUR J. ROTH, COMMISSIONER OF THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK, and THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the New York courts properly held that there was a rational basis under the Equal Protection Clause supporting New York's policy of refraining from enforcement of the State's sales and excise taxes on cigarettes and motor fuel sold on Indian reservations to non-Indians.

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STATEMENT OF THE CASE

Petitioners New York Association of Convenience Stores, et al., seek this Court's review of decisions of the New York Appellate Division, Third Department, and the New York Court of Appeals that rejected petitioners' equal protection challenge to New York's policy of refraining from enforcing the State's sales and excise taxes on cigarettes and motor fuel sold on Indian reservations to non-Indians. *See New York Association of Convenience Stores v. Urbach*, 699 N.E.2d 904 (N.Y. 1998), *on remand*, 694 N.Y.S.2d 885 (N.Y. Sup. Ct. 1999), *aff'd*, 712 N.Y.S.2d 220 (N.Y. App. Div.), *appeal dismissed*, 744 N.E.2d 142 (N.Y. 2000), *lv. denied* (N.Y. July 2, 2001).

In 1998, the Court of Appeals held that respondents' failure to enforce the taxes at issue did not constitute race-based discrimination subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. 699 N.E.2d at 908. Instead, the Court found that respondents' policy of forbearance was "predicated on [respondents'] sensitivity to both tribal sovereignty issues and the complex restrictions imposed by the Indian Trader Laws." *Id.* The Court remanded the proceeding to the New York Supreme Court to determine whether respondents' policy was "sustainable under a rational basis analysis." *Id.* at 909.

On remand, Supreme Court held that the policy satisfied the rational basis standard. 694 N.Y.S.2d at 889-890. The court sustained the nonenforcement policy, finding it rationally based in light of respondents' extensive attempts to resolve the tax collection issues through product seizures and litigation as well as through negotiated compromise and legislation. 694 N.Y.S.2d 888-889. The Appellate Division,

Third Department, affirmed. 712 N.Y.S.2d 220 (N.Y. App. Div. 2000). That court observed that the State's attempt to enforce the taxes at issue in 1997 while this litigation was pending resulted in civil unrest and showed that the tax collection regulations upheld by this Court in *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994), were unworkable without cooperation from the Indian retailers. 712 N.Y.S.2d at 222. The Court of Appeals dismissed petitioners' subsequent appeal for want of a substantial constitutional question, 744 N.E.2d 142 (N.Y. 2000), and then denied petitioners' motion for leave to appeal. Pet. App. 1a.

REASONS FOR DENYING THE WRIT

Petitioners urge this Court to grant certiorari in order to resolve a purported conflict between the decisions below and decisions of this Court and others regarding the proper equal protection standard of review applicable to special treatment of Indians. Pet. at 3. Petitioners are wrong; there is no such conflict. In holding that the State's nonenforcement policy is a constitutionally permissible response to the tax enforcement problems resulting from the unique political attributes of Indian nations under federal law, the courts below explicitly relied upon the rational basis standard as previously applied by this Court to state treatment of Indians. *See Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 501 (1979) (special treatment is valid "unless [it] bear[s] no rational relationship to the State's objectives"); *see also New York Association of Convenience Stores*, 699 N.E.2d at 908 (citing *Yakima Indian Nation*). Because this case presents no cert-worthy issues that merit review by the Court, the petition for certiorari should be denied. *See* Sup. Ct. R. 10(b), (c).

I. THE DECISIONS BELOW DO NOT CONFLICT WITH DECISIONS OF THIS COURT, UNITED STATES CIRCUIT COURTS, OR OTHER STATE COURTS OF LAST RESORT REGARDING THE LEVEL OF EQUAL PROTECTION SCRUTINY APPLICABLE TO CLASSIFICATIONS INVOLVING INDIANS.

Petitioners' arguments for certiorari are premised on the unsound contention that the decisions below are in conflict with language contained in this Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974), and quoted in decisions of the Fifth, Eighth and Ninth Circuits and the highest courts of Maine and Vermont.[1] Petitioners essentially claim that the language of these decisions recognized a new level of equal protection scrutiny applicable to special treatment of Indians that is more stringent than ordinary rational basis review. Pet. at 3, 17 n.5 (claiming that the new equal protection standard is "somewhat akin" to intermediate scrutiny). This argument is meritless.

A. The decisions below do not conflict with this Court's *Mancari* line of cases.

There is no conflict between the decisions below and *Mancari* and its progeny. In *Mancari*, this Court rejected an equal protection challenge to a Bureau of Indian Affairs (BIA)

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1. *See Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997), *cert. denied*, 523 U.S. 1117 (1998); *Alaska Chapter, Associated General Contractors of America, Inc. v. Pierce*, 694 F.2d 1162 (9th Cir. 1982); *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991); *United States v. Aanerud*, 893 F.2d 956 (8th Cir.), *cert. denied*, 498 U.S. 822 (1990); *In re A.J.*, 733 A.2d 36 (Vt. 1999); *In re Marcus S. et al.*, 638 A.2d 1158 (Me. 1994).

Indian hiring preference. The Court rejected the argument that the preference constituted racial discrimination or was even a racial preference. 417 U.S. at 553. The Court found that the preference was "political rather than racial in nature" because it applied to Indians not as a discrete racial group but as members of federally recognized tribes that were quasi-sovereign entities governed by the BIA in a unique fashion. *Id.* at 553 n.24. The Court found that the preference was reasonably related "to a *legitimate, nonracially based goal.*" *Id.* at 554 (emphasis added). That is the language of conventional rational basis scrutiny, and that was the standard this Court applied in *Mancari*.

It is true that in *Mancari*, 417 U.S. at 555, and subsequent cases the Court has stated that "fulfillment of Congress' unique obligation toward the Indians" is a legitimate governmental interest justifying special treatment of Indians, favorable and unfavorable alike.[2] However, the Court has

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2. *See, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 673 n.20 (1979) (treaty rights allowing special fishing rights to Indians upheld, citing *Mancari)*; *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500-502 (1979) (rejecting the Nation's equal protection challenge to Washington's assertion of partial jurisdiction over the reservation under a state law enacted pursuant to a federal statute); *United States v. Antelope*, 430 U.S. 641, 645-650 (1977) (rejecting equal protection challenge to the application of federal murder statutes to Indian defendants when more favorable state law would have applied to non-Indians); *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 85-86 (1977) (rejecting equal protection challenge to a federal statute providing for the distribution of the proceeds of an award for the breach of a treaty but excluding individual Indians who were not a recognized tribal entity and had no vested rights in any tribal property); *Moe v.*

(Cont'd)

routinely upheld the special treatment of Indians against equal protection challenges and has never held or even suggested that such treatment is subject to a heightened form of rational basis scrutiny under *Mancari*. Nor can the Court's identification of this specific governmental interest be understood to mandate the heightened scrutiny advocated by petitioners. In any event, the courts below found that the challenged policy does, in fact, advance the sovereignty interests referred to in *Mancari*. *See* 699 N.E.2d at 908 (policy "is predicated on the Department's sensitivity to . . . tribal sovereignty issues"); 712 N.Y.S.2d at 222 (referring to need for tribal cooperation in enforcement of the taxes).

Two decisions of this Court following *Mancari* make clear that the rational basis scrutiny applicable to Indian classifications is the same as that uniformly applied in other equal protection cases. In *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979), the Court applied "conventional Equal Protection Clause criteria" in rejecting the Yakima Nation's challenge to Washington's assertion of partial jurisdiction over the reservation under a state law enacted pursuant to federal law. 439 U.S. at 501. The Court held that "[u]nder those criteria, legislative classifications are valid unless they bear no

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(Cont'd)

Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 479-480 (1976) (rejecting equal protection challenge to tax immunity based on federal law granted to Indians on reservations, including immunity from the cigarette sales tax as applied to on-reservation sales by Indians to Indians); *Fisher v. District Court*, 424 U.S. 382, 390-391 (1976) (rejecting equal protection challenge to denial of Indian access to state courts to pursue adoption proceedings when all the parties were Indians who lived on the reservation).

rational relationship to the State's objectives." *Id.* (citing *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 314 [1976]). Additionally, in *United States v. Antelope*, 430 U.S. 641, 647 n.8 (1977), the Court, citing *Mancari*, rejected the claim that the application of federal murder statutes to Indian defendants when more favorable state law would have applied to non-Indians amounted to invidious racial discrimination. The Court noted that "respondents do not seriously contend that application of federal law to Indian tribes *is so irrational* as to deny equal protection." *Id.* (emphasis added).

The New York Court of Appeals cited *Yakima Nation* and *Mancari* in support of its holding below that New York's policy of forbearance did not amount to invidious discrimination based on race because the policy responded to the sovereign attributes of Indian reservations under federal law. 699 N.E.2d at 908. On remand, the New York Supreme Court and Appellate Division correctly applied the rational basis test as set forth in *Yakima Nation*.[3]

Finally, there is no conflict between the decisions below and this Court's decisions in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) and *Rice v. Cayetano*, 528 U.S. 495 (2000). *Adarand* held that strict scrutiny must be applied to all racial classifications. 515 U.S. at 227. The majority in

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3. The courts below did not consider the question that petitioners now ask this Court to decide because petitioners did not argue below that the standard of equal protection review applicable in this proceeding is the heightened form of rational basis scrutiny that they now contend is applicable to classifications involving Indians. Following the remand by the Court of Appeals, petitioners argued only that respondents' policy was not rationally related to a purpose of the tax statutes at issue.

Adarand did not even suggest that the rule of *Mancari*, holding that Indian preferences were political rather than racial in nature, was at odds with *Adarand*. *Cf. Adarand*, 515 U.S. at 244 n.3 (Stevens, J., dissenting) (citing *Mancari*); *Williams v. Babbit*, 115 F.3d at 665 (suggesting in dictum that *Adarand* is in tension with *Mancari*). *Rice* involved voting rights under the Fifteenth Amendment, not the Equal Protection Clause, and dealt with native Hawaiians, whom the Court refused to analogize to Indians. 528 U.S. at 518-519. Nor did the *Rice* Court's discussion of *Mancari* and its progeny suggest that *Mancari* had created a new level of equal protection scrutiny or that *Mancari* was no longer good law. *Id.* at 518-522. Consequently, the New York courts properly followed this Court's precedents in upholding the policy at issue here.

B. There is no conflict between the decisions below and those of the Circuit and State courts that petitioners rely on.

The decisions below also do not conflict with the circuit and state cases relied upon by petitioners. Petitioners do not cite a single decision holding that any State violated the Equal Protection Clause by not enforcing state cigarette and motor fuel taxes on sales made to non-Indians on Indian reservations.[4] Even more generally, none of the decisions cited by petitioners invalidated on equal protection grounds special treatment favoring Indians similar to that alleged to exist here. Finally, none of these decisions stated that the

4. This Court has held that immunizing reservation sales of cigarettes to tribe members from state cigarette taxes does not violate the Equal Protection Clause. *See Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 479-480 (1976).

rational basis scrutiny applied to such treatment in fact constitutes a more stringent form of rational basis review.

A conflict within the meaning of Rule 10 should involve holdings that are squarely in conflict rather than language that is at most arguably inconsistent. *See* Sup. Ct. R. 10(b), (c); *cf. Yee v. City of Escondido, California*, 503 U.S. 519, 537-538 (1992) (suggesting that conflicting "results" are what count for purposes of Rule 10). The holdings of the decisions cited by petitioners are not at odds with the decisions below. In fact, the cases cited by petitioners are largely consistent with the decisions in this case, because, with one exception, *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997), *cert. denied*, 523 U.S. 1117 (1998), the decisions all upheld the special treatment of Indians. In *Williams*, the Ninth Circuit's equal protection analysis suggested that a preference regarding the Alaska reindeer industry for natives, unrelated to native land, tribal or communal status, was problematic. But this analysis was dictum, because the court interpreted the statute as not permitting the preference and thus found "no reason to unnecessarily resolve" the constitutional question. 115 F.3d at 666.

Moreover, in *Alaska Chapter, Associated General Contractors of America, Inc. v. Pierce*, 694 F.2d 1162 (9th Cir. 1982), the Ninth Circuit rejected the argument that *Mancari*'s holding should be limited to special treatment furthering Indian self-government, upholding a federal preference for Indian contractors to build housing for Indians. The court found that in *Mancari* this Court had "applied *the rational basis test* to the legislation because of the unique legal status of Indian tribes under federal law" and had found that "the BIA preference was designed *to further a legitimate governmental purpose.*" 694 F.2d at 1167 (emphasis added). The Ninth Circuit's reading of *Mancari* to apply traditional

principles of rational review was also evident in *Squaxin Island Tribe v. Washington*, 781 F.2d 715, 722 (9th Cir. 1986), where the court held that "[t]he state's interest in controlling the distribution of liquor within its borders" insulated the tribal liquor vendor contracts at issue from equal protection challenge, thus belying petitioners' contention here that special treatment of Indians must be tied solely to Indian concerns. *See also United States v. Decker*, 600 F.2d 733, 740-741 (9th Cir.) (upholding treaty preference for Indian salmon fishing), *cert. denied*, 444 U.S. 855 (1979). The holdings of these Ninth Circuit decisions are not at odds with the decisions below.

Similarly, neither the Fifth Circuit's decision in *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991) (upholding an Indian exception to state and federal laws prohibiting possession of peyote) nor the Eighth Circuit's decision in *United States v. Aanerud*, 893 F.2d 956 (8th Cir.) (upholding a treaty-based Indian exception to the prohibition on the trapping of leeches), *cert. denied*, 498 U.S. 822 (1990), conflicts with the decisions below. In *Peyote Way*, the court specifically found that the Indian exemption was "rationally related to the legitimate governmental objective of preserving Native American culture." 922 F.2d at 1216 (footnote omitted). *See also United States v. Eagleboy*, 200 F.3d 1137 (8th Cir. 1999) (upholding an informal policy not to prosecute members of federally recognized tribes for possession of bird parts in violation of federal migratory bird statute); *Livingston v. Ewing*, 601 F.2d 1110 (10th Cir.) (upholding a New Mexico policy that allowed only Indians to sell handcrafted goods at a historic site), *cert. denied*, 444 U.S. 870 (1979).

Thus, none of the circuit cases that petitioners rely on invalidated an Indian preference on equal protection grounds, and none held that the rational basis standard applicable to such preferences is more stringent than conventional rational basis scrutiny. Likewise, the two state cases cited by petitioners, *In re A.J.*, 733 A.2d 36 (Vt. 1999), and *In re Marcus S., et al.*, 638 A.2d 1158 (Me. 1994), also rejected equal protection challenges to federal Indian child welfare legislation and did not hold or even suggest that heightened rational basis scrutiny was required.

Indeed, petitioners cite only one case, *Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335 (D.C. Cir. 1998), in which the court explicitly considered the argument that special treatment of Indians is subject to a heightened form of rational basis scrutiny. In *Narragansett*, the District of Columbia Circuit rejected the argument, holding that "*Mancari* merely applied ordinary rational basis analysis to determine whether the employment preference rationally related to the government's interest in fulfilling its trust obligation." 158 F.3d at 1340. As did the New York courts below, the *Narragansett* court upheld the special Indian treatment at issue (there, the exclusion of the Tribe from Indian gaming) against an equal protection challenge. Accordingly, there is no conflict between the holdings of the decisions below and the holdings of the circuit court and state supreme court decisions on which the petition for certiorari is based.

C. This Court has not recognized a "fourth level" of equal protection scrutiny.

In its equal protection jurisprudence generally, this Court has never recognized the existence of the "fourth level" of equal protection scrutiny urged by petitioners. *See Clark v. Jeter*,

486 U.S. 456, 461 (1988) (recognizing three levels of equal protection scrutiny). Classifications based on race, alienage or national origin and laws affecting fundamental rights are subject to strict scrutiny. *Id.*; *see also City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). The Court applies an intermediate level of scrutiny to classifications based on sex and illegitimacy. *Nguyen v. Immigration and Naturalization Service*, 121 S. Ct. 2053, 2059 (2001) (sex); *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982) (illegitimacy). All other classifications are subject to the rational basis standard, "which is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause," *Dallas v. Stanglin*, 490 U.S. 19, 26 (1989), requiring "only that the classification rationally further a legitimate state interest," *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (citations omitted). *See also Federal Communications Commission v. Beach Communications*, 508 U.S. 307, 313 (1993) (a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification"). There is only one rational basis test and it was correctly applied here by the New York courts.

II. THE DECISIONS BELOW DO NOT CONFLICT WITH ANY OTHER DECISIONS OF THIS COURT.

Petitioners make the groundless assertion that, in addition to conflicting with *Mancari*, the decisions below are at odds with other decisions of the Court regarding the taxation of Indian tribes. Pet. at 23-24. First, there is no conflict between the decisions below and this Court's

decision in *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994). In *Attea*, this Court rejected a facial challenge, based on the Indian trader laws, 25 U.S.C. §§ 261-266, to respondents' cigarette tax collection regulations. In upholding the facial validity of the regulations, the Court nevertheless recognized that future litigation might be necessary to resolve issues regarding their implementation. 512 U.S. at 77.

Attea was not an equal protection case and accordingly did not address any equal protection ramifications of respondents' subsequent determination not to enforce the regulations. Nor did *Attea* negate or diminish the practical and legal impediments to tax collection and enforcement resulting from the substantial attributes of sovereignty possessed by the Indian tribes under federal law and from the fact that tribal customers were entitled to obtain tax-free products. *See New York Association of Convenience Stores v. Urbach*, 694 N.Y.S.2d 885, 888-889 (N.Y. Sup. Ct. 1999) (recounting the history of respondents' tax enforcement attempts).

Although the Court recognized in *Oklahoma Tax Commission v. Citizen Band Potawatami Indian Tribe of Oklahoma*, 498 U.S. 505, 514 (1991), and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 161-162 (1980), that States are not powerless to collect taxes on reservation sales to non-Indians, in the present case New York tried several collection options, including tax agreements and off-reservation seizures, and found them unsatisfactory. *See New York Association of Convenience Stores*, 712 N.Y.S.2d at 222 (N.Y. App. Div. 2000) (determining that respondents could not enforce the taxes without the cooperation of the tribes and that the

interception and seizure of shipments resulted in civil unrest); *see also* Notice of Adoption, N.Y. St. Reg., April 29, 1998, pp. 22-24 (explaining that respondents repealed the *Attea* regulations only after determining that there was no practical way to enforce them). *Attea*, *Potawatomi* and *Colville* thus do not mandate that States collect taxes on reservation sales of cigarettes and gasoline to non-Indians in order to comply with the dictates of the Equal Protection Clause.

III. THE PETITION FOR CERTIORARI DOES NOT RAISE AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

The question that petitioners are asking this Court to resolve does not raise any important questions of federal law. The question of the proper level of equal protection scrutiny applicable in Indian cases is settled. As set forth in Point I, above, this Court has upheld the special treatment of Indians against equal protection challenges using conventional rational basis scrutiny. The Court's consideration of the present case would add nothing to its existing Indian equal protection jurisprudence. The courts below found that the State's policy was rational because it recognized the plain and unalterable fact that reservation retailers are uniquely situated when compared to petitioners and their members. The New York courts determined that the unique characteristics of the reservation retailers implicate far different tax enforcement concerns than those applicable to merchants located outside the reservations. This holding is completely consistent with the *Mancari* line of cases.

The state and lower federal courts have applied *Mancari* without generating the conflict posited by petitioners. The New York courts did not decide an important question of federal

law in a way that conflicts with another state court of last resort or of a United States court of appeals. Sup. Ct. R. 10(b). Nor did the New York courts decide such a question that has not been, but should be, settled by this Court, or in a way that conflicts with relevant decisions of this Court. Sup. Ct. R. 10(c). Consequently, nothing in this case merits review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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